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July 31, 1990

The Honorable C. Kimball Rose
Presiding Judge
Maricopa County Superior Court
201 W. Jefferson, 4th Fl., CCB
Phoenix, Arizona 85003

Re: I90-069 (R90-094)

Dear Judge Rose:

You have asked this office for a formal opinion concerning the general election at which a superior court judge would first stand for retention following his or her appointment. You have provided two examples to illustrate your question. Both examples concern judges appointed on October 21, 1988, prior to the November 8, 1988 general election, as follows:

1. Judge A signed the Loyalty Oath on November 9, 1988, and filed it with the Secretary of State on November 22, 1988. Judge A's swearing-in ceremony was held January 6, 1989, and the first payroll check was received on January 13, 1989.

2. Judge B signed the Loyalty Oath on October 28, 1988, and filed it with the Secretary of State on November 3, 1988. Judge B's swearing-in ceremony was held on December 16, 1988. Judge B assumed judicial duties on December 19, 1988, and the first payroll check was received on January 1, 1989.

We conclude that both Judge A and Judge B, if they seek to be retained in office, must timely file a declaration of desire to be retained in office and their names must appear on the November 6, 1990 general election ballot.

The Arizona Constitution provides for a system of merit selection, gubernatorial appointment and retention of justices or judges of any court of record except for superior court judges in counties with a population of less than one hundred fifty thousand persons. Ariz. Const. art. VI, § 37. This section also provides, in part, as follows:

> Each justice or judge so appointed shall initially hold office for a term ending sixty days following the next regular general election after the expiration of a term of two years in office.

(Emphasis added). While this provision specifies the minimum duration of this initial term of office as well as establishing the day on which it ends, no date is set for the beginning of the term. Further, no other constitutional provision or statute specifies the time at which this terms begins. It is only when the date of the commencement of the term is known that it can be determined whether a term of two years in office has been completed prior to the general election.

Where no time is fixed for the beginning of the term of an appointive office, courts have indicated that the general rule is that the term begins on the date of appointment. State ex rel. Sanchez v. Dixon, 4 So.2d 591 (La. 1941); People ex rel. Labochette v. Morris, 41 Cal. 2d 430, 106 P.2d 635 (1940); People ex rel. Dibelka v. Reinberg, 263 Ill. 536, 105 N.E.715 (1914).

We next must determine what constitutes the date of appointment by the governor. Ariz. Const. art. V, § 12 directs that "[a]ll commissions shall issue in the name of the state, and shall be signed by the governor, sealed with the seal of the state, and attested by the secretary of state." A.R.S. § 38-221 similarly provides, in pertinent part, as follows:

> § 38-221. Commission of office
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> A. The governor shall commission in the name and by the authority of the state:
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> 1. Officers elected by the electors of the state whose commissions or certificates of election are not otherwise provided for.
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> 2. Officers elected by the legislature.
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> 3. Officers of the militia.

> 4. Officers appointed by the governor, or by the governor with the advice and consent of the senate.
>
> B. The commission shall be signed by the governor and attested by the secretary of state under the great seal of the state.
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> * * *

(Emphasis added). Although Arizona law does not specify the point at which an appointment is deemed to have been made, the general rule is that an appointment is complete when the last act required of the appointing authority has been performed. See Marbury v. Madison, 5 U.S. 137 (1803)(where the appointment was the sole act of the president it was completely evidenced when shown that he had done everything to be performed by him and the president's last act was to sign the commission); Goutos v. United States, 552 F.2d (Ct.Cl. 1976); Molnar v. City of Aurora, 38 Ill. App. 3d 580, 348 N.E. 2d 262, 264 (1976); State v. Steele, 81 So.2d 542, 546 (Ala. 1955); Smith v. State, 26 So.2d 543, 544 (Miss. 1946). The last act that Ariz. Const. art. V, § 12 and A.R.S. § 38-221 requires of the governor in making an appointment is the act of signing the commission.

Arizona law requires the commission to be attested by the secretary of state who must also affix the state seal. Because these acts following the governor's signature are "performed by some other than the appointing power [they] constitute no part of the appointing power." Draper v. State, 175 Ala. 547, 57 So. 772, 773 (1912). The governor's signature can almost be viewed as a warrant for the secretary of state to sign and seal the completed appointment. See Marbury v. Madison, 5 U.S. at 158. Further, the secretary of state in so doing performs a mandatory, ministerial act. Miller v. Barber, 4 Wyo. 409, 34 P. 1028 (1893). The completed commission becomes conclusive evidence of the appointment. Marbury v. Madison, 5 U.S. at 157.

We must note that the commissions of office in Arizona sometimes specify a date on which the appointment is to begin. Frequently, this date coincides with the date of the governor's signing of the appointment. This is true with respect to both Judge A and Judge B. However, it occasionally predates or sometimes follows that date. Since the term of office begins on the date of appointment and the governor's signature on the commission constitutes the appointment, any purported effective date preceding the governor's signature would not be operative. In those instances, the term of office could begin no earlier than the date the governor signs the commission.

If the governor specifies a delayed effective date for an appointment, it is our conclusion that the later date would signal the commencement of the term of office. This power to choose when the term begins would not be possessed by the governor if Arizona law had fixed the date for the beginning of these judicial terms of office. As was recognized in Perkins v. Hughes, 53 Ariz. 523, 91 P.2d 261 (1939), "[i]t is the universally accepted rule that if a term of office to be filled by appointment is fixed by law, that any power to change the term so fixed is void." That court interpreted the phrase,"and shall hold his office for two years from the first Tuesday in April succeeding his appointment," to preclude any alteration of the date for the beginning of the term. Id. However, if the law prescribes the length of a term of office with no date for the beginning or ending of the term, the appointing power may supply those missing dates. State ex rel. Sikes v. Williams, 222 Mo. 268, 121 S.W. 64, 66-67 (1909); See also Robertson v. Coughlin, 196 Mass. 539, 82 N.E. 678, 679 (1907)(the delegation of power to appoint a subordinate officer whose length of term is not fixed gives authority to the appointing power to determine its duration).

You have implicitly questioned the significance of the taking of the oath, the swearing-in ceremony and the commencement of judicial duties in determining when a term of office begins pursuant to Ariz. Const. art. VI, § 37. None of these events effects the commencement of the term of office.

An appointee typically must perform certain acts in order to have the right to enter into the actual possession of the office even though his completed appointment has already triggered the beginning of his term. See United States v. LeBaron, 60 U.S. 73 (1856). Ariz. Const. art. VI, § 26 provides, in relevant part, that:

> Each justice, judge and justice of the peace shall, before entering upon the duties of his office, take and subscribe an oath that he will support the constitution of the United States and the constitution of the State of Arizona, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

(Emphasis added). In addition, the oath set forth in A.R.S. § 38-231 must be taken by all public officers before entering upon the duties of the office. Until the oath is taken, the officer is not entitled to any compensation. A.R.S. § 38-231(D). "The matter of when the oath of office is taken is

immaterial to its term." Hawkins v. City of Fayette, 604 S.W.2d 716, 720 (Mo. App. 1980). The holding of any swearing-in ceremony is a matter of form only providing that the oath requirement is met. See generally United States v. LeBaron, 60 U.S. 73; Marbury v. Madison, 5 U.S. 137 noted in 63A AM. JUR. 2D Public Officers and Employees § 106 (1984). The date on which a newly appointed judge actually enters upon his duties, once qualified to do so, does not effect the commencement of his term.

We conclude that the initial terms of office for both Judge A and Judge B began when the governor signed the commissions of their appointments on October 21, 1988. Therefore, they each complete a two year term on October 21, 1990. Their terms officially end sixty days following the next regular general election thereafter. Ariz. Const. art. VI, § 37. That election will be held on November 6, 1990. Should Judges A and B desire to be retained in office, they must file a declaration of that intent "not less than sixty nor more than ninety days prior to the regular general election next preceding the expiration of [their] term[s] of office." Ariz. Const. art. VI, § 38. Therefore, their declarations of desire to be retained in office must properly be filed no earlier than August 8, 1990 and no later than September 7, 1990 in order to qualify for the 1990 general election ballot.

Sincerely,

for BOB CORBIN
Attorney General

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